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Term No. 464.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY, PETITIONER,

VS.

WALTER O. HILL, TREASURER AND EX OFFICIO COLLECTOR OF HENRY COUNTY, MISSOURI, RESPONDENT.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT OF PETITIONER.

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STATEMENT.

This cause is here on a writ of certiorari to the Supreme Court of the State of Missouri.

Petitioner, hereinafter called the Trust Company, filed its amended bill in equity to enjoin the respondent, the Collector of Revenue for Henry County, Missouri, from collecting 25 per cent of the taxes assessed as of June 1, 1926, against the Trust Company's shares of stock by the Assessor of Clinton Township, Henry County, Missouri (Clinton Township being the taxing

district) for the year 1927, on the ground that the tax was void because the township assessor deliberately, intentionally, systematically, and arbitrarily discriminated against the petitioner's shareholders by assessing their shares of stock at full value and deliberately, systematically, and arbitrarily omitting to assess certain classes of property of great value, such as poultry of all kinds and sucking animals of all kinds, and deliberately, systematically, and arbitrarily assessing the great mass of other property in the township which is subject to an *ad valorem* tax at not to exceed 75 per cent of its true value in money, in contravention of the Trust Company's rights under the Fourteenth Amendment of the Constitution of the United States to the equal protection of the laws and to due process of law.

The bill further alleged that the tax in excess of 75 per cent thereof was illegal and void and that the Trust Company had no clear, complete, and adequate legal remedy at any stage; that there was no remedy by appeal to the County Board of Equalization because said County Board had no power to grant any relief; nor was there any remedy by appeal to the State Board of Equalization because no appeal is permitted by law; nor was there any remedy by a writ of certiorari against the County Board of Equalization or against the State Board of Equalization because the record of neither board would show or could be made to show the discrimination; nor was there any remedy by setting up the discrimination in the then pending action by the collector against the Trust Company for the collection of these taxes, as a partial defense nor by

cross bill therein, nor by paying said tax and suing to recover 25 per cent of it back.

The bill alleged the pendency of an action brought by the respondent to recover these taxes and that, unless the Trust Company be granted the relief therein sought, it would either have to pay the taxes or the taxes would become a lien on the shares of stock and the shares would be sold; and that the Trust Company has a large number of stockholders and brings this suit as trustee for said stockholders and that this action will prevent a multiplicity of actions.

The bill further alleged that the Trust Company had tendered to the respondent 75 per cent of the taxes before the same fell due and continues to tender the same.

The bill prayed that the respondent be enjoined from the prosecution of the said pending action to recover the taxes until the termination of this action and that the respondent be permanently enjoined from collecting the illegal tax, that is, the excess over 75 per cent.

(For Amended Petition see Record, pages 3 to 12.)

The answer, after admitting certain allegations and denying certain other allegations, neither of which are now material, alleges (Record, p. 15, par. 16); that the bank is guilty of laches in not first appealing to the County Board of Equalization (Art. III, Chap. 119, R. S. Mo. 1919) and in not first appealing to the State Board of Equalization (Art. IV, Chap. 119, R. S. Mo. 1919) before bringing this action and that

the action of the State Board of Equalization in fixing the amount of the assessment is a final judgment (see par. 18 of answer, Record, p. 15).

The answer did not plead that plaintiff was guilty of laches in not first appealing to the State Tax Commission. The necessity of first appealing to the State Tax Commission did not arise in this case until the Supreme Court of Missouri injected it in the opinion in this cause (Record, pp. 251 to 256). The opinion is not yet reported in the official report (Sec. 19 S. W. (2d) l. c. 749). Counsel for the defense below complained only of the Trust Company's failure to first appeal to the County Board of Equalization or the State Board of Equalization before coming into equity. The Supreme Court of Missouri in the case of *Laclede Land & Improvement Company* v. *State Tax Commission*, 295 Mo. 298, decided in 1922, that the State Tax Commission had no jurisdiction to grant relief against a taxpayer complaining of a discriminatory assessment. This decision continued to be the law of Missouri until the opinion was handed down in the present case.

In respondent's brief in opposition to petition for writ of certiorari in this cause, on page 2, it is stated that the trial court held that since the Trust Company did not appear before the State Tax Commission and make complaint or request relief in regard to the assessment of its property, it failed to avail itself of its adequate and complete legal remedies and was not entitled to relief. This statement is not true. The record shows that no attorney or party to this action ever made mention of the State Tax Commission in pleadings, evidence, or argument.

At the trial the Trust Company showed that an assessment of its shares of stock had been made at 100 per cent per annum of its actual value in money as shown by the return of its officers under oath as required by law. This evidence was not disputed (Record, p. 53).

This evidence also showed and it was admitted that Henry County is under township organization (alleged in par. II, Record, p. 4; admitted par. 2, Record, p. 12) and that Clinton township of Henry County was the taxing district in which the Trust Company had its place of business and that the assessor of Clinton Township intentionally and systematically omitted to assess any poultry of any kind (Record, pp. 121, 169, 173, 180) and that the value of chickens alone in Henry County was between $400,000.00 and $500,000.00 on June 1, 1926 (Record, pp. 112, 136, 139) and that it was the deliberate policy of the assessor not to assess any sucking animals (Record, pp. 46, 49, 76, 109, 121, 148, 169, 173, 179) and that sucking lambs on June 1, 1926, were worth more than all other sheep in Henry County (Record, pp. 45, 108, 123, 124, 174). This evidence was undisputed.

The defendant admitted under oath that merchants' stock of goods in Clinton Township in which is located the biggest city in Henry County, were assessed as of June 1, 1926, at about 75 per cent of their true value (Record, pp. 38, 39). This evidence was uncontradicted. Plaintiff showed by competent and well qualified experts who studied every transfer of real estate in Henry County made in the calendar year of 1926 that the

assessed valuations of property conveyed during that year were not over 60% of the actual (not the expressed) considerations for the transfers (Record pp. 55 to 59, 62, 63, 65) and that real estate in Clinton Township was assessed at not to exceed 75% of its true value in money (Record, pp. 59, 63, 115). This evidence was uncontradicted.

The Trust Company's evidence showed that sheep in Clinton Township and in Henry County were assessed at an average value of $4.59 per head but were worth on an average more than twice that much (Record, pp. 43, 48, 124); that neat cattle were assessed at $29.77 per head but were actually worth more than twice that much (Record, pp. 45, 46, 103, 126); that hogs were assessed at $13.91 per head which was about two-thirds of their value (Record, pp. 46, 125); that horses were assessed at an average of $31.66 per head which was not 60 per cent of their actual value (Record, p. 52) and that mules were assessed at $47.69 a head which was not one-half of their value (Record, p. 50); that household goods were assessed at from 10 per cent to 60 per cent of their actual value (Record, pp. 53, 104, 110, 116, 127) and that farm machinery was assessed at less than 75 per cent of its value (Record, p. 110 and tables at pp. 41 and 134).

A comparison of the values of livestock and farm implements and machinery in Henry County, Missouri, as ascertained by the Federal Census of Agriculture of 1925, with the total assessed valuation of the different classes of the same property on the first day of June, 1926, is as follows:

	Valuations According to Federal Census.	Assessed Valuations.
Horses	$464,078	$234,900
Mules	280,856	166,550
Cattle	1,045,057	643,795
Sheep	56,426	21,469
Hogs	541,323	238,240
Chickens	426,482	Nothing
All other livestock	20,582	737
Farm machinery	901,272	169,979

For above tables see Record, pp. 41 and 134.

Defendant made no effort to controvert this testimony. Defendant's testimony consisted wholly of the testimony of judges of the County Court, all of whom were farmers, the assessor of Clinton Township, the County Surveyor, who was a member of the County Board of Equalization, and several assessors of other townships. Members of the County Board of Equalization testified that they told the assessors to assess everything at full value and that they tried to equalize all property at 100 per cent, but that the assessors did not assess any sucking animals of any sort and did not assess any poultry.

The assessor of Clinton Township who made the assessments in question testified that he assessed property as near 100 per cent as he knew how (Record, p. 177); that he followed a schedule "already drawed" (p. 178) by which he tried to make an average to follow for different kinds of stock; that he didn't go out to see the property but left the assessment list with the taxpayer for him to fill out, sign, and return to him; that he didn't put the taxpayer under oath (p. 179); that he told the taxpayer he didn't have to list sucking

animals and that he did not assess them and that he did not assess chickens. He testified that he and eighteen other township assessors met with the County Court sometime before June 1 and agreed that a flat rate of $5.00 per head for sheep would be fair (p. 180) and that they agreed on $40.00 for common mules and an average rate of $30.00 for grade cattle of three years and over.

The proof of the fact of the discrimination was overwhelming and in fact not seriously controverted.

The court below found for the defendant and the Trust Company appealed the case to the Supreme Court of Missouri. The motion for new trial in the court below (Record, p. 240, *et seq.*) raised the questions under the Federal Constitution which are here involved. The Supreme Court of Missouri on June 29, 1929, rendered a judgment affirming the judgment of the court below (Record, p. 245). A motion for rehearing was duly filed raising the questions herein raised (Record, p. 257). The same was overruled by the Supreme Court of Missouri on August 2. Thereupon petition for writ of certiorari was timely filed and the writ granted.

The Supreme Court of Missouri, in the opinion found in the record at page 246 (19 S. W. (2d) 746, not yet published in official reports), affirmed the judgment. In stating the questions involved in the case (Record, pp. 249 and 250, 19 S. W. (2d) l. c. 749), the court said that there could be no question but that the assessor's failure to assess sucking animals and poultry was both intentional and pursuant to a system which must have been patent not only to the County Board

of Equalization but to the State Board as well, and that as the latter board permitted the assessment as a whole to stand it must be presumed that a like situation obtained with respect to every county in the state, from which it would appear on principle that all taxpayers of the state should be entirely relieved so far as the taxes for 1927 are concerned because the owners of poultry were not taxed at all. This grave situation led the court to declare, "It seems necessary that we rechart our course." Thereupon, the court proceeds to discuss the contention of the defendant that the Trust Company "did not make timely use of available legal remedies which were in every respect adequate and complete." In discussing these clear and adequate remedies available to the bank two years before the opinion was handed down, the court holds that the County Board of Equalization was powerless to grant relief (Record, p. 251); that the statute did not provide for appeals to the State Board of Equalization, a hearing before it being a mere matter of grace. The court further said (p. 251):

> "Appellant nowhere mentions in its brief and argument the State Tax Commission. • • • If that tribunal is without jurisdiction to administer relief where fraudulent assessments have been made such as are charged to have been made in this case, then it must be true, as appellant asserts, that it has no remedy except in a court of equity."

The court then makes reference to Section 12847 R. S. Mo. 1919 in relation to the powers of the State Board of Equalization particularly referring to its

power "to receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, to investigate the same, and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist. The court also cites the provisions of the statute which permits an aggrieved taxpayer to appeal to the State Tax Commission after the several boards of equalization have passed upon the assessment rolls and before the delivery of the tax roll to the collector. Upon such appeal the State Tax Commission shall call a hearing at the county seat and shall order the assessor to be present with the sworn statements of all persons whose property or whose assessments are to be considered. The Tax Commission shall publish a copy of the order in a newspaper in the county and, where practicable, notice shall be given by mail of said hearings to all persons whose assessments are to be considered. A member of the Commission or one of its agents must appear at the hearing to hear and determine as to the proper assessment of all property and persons mentioned in the notice and all persons affected by a review of the assessments. A member of the Commission or its agent is authorized to correct the assessment rolls and put upon the assessment rolls property omitted from assessment. Such action "shall be final when approved by the State Board of Equalization."

The court holds that under such statute the State Tax Commission has authority to put on the assessment rolls property omitted from assessment and to correct the assessment of any property which has been improperly valued.

The Supreme Court further says that this remedy is adequate, certain, and complete (19 S. W. (2d), l. c. 751, Record, p. 256).

In the opinion (p. 255) the court alludes to the fact that in 1922 in the *Laclede Land & Improvement Company case* v. *State Tax Commission,* 295 Mo. 298, it denied all such jurisdiction to the State Tax Commission. The opinion does not quote the former opinion in which this same court characterizes the contention that the State Tax Commission had such jurisdiction as "preposterous" and "unthinkable."

Under the decision of the Supreme Court of Missouri in this cause the Trust Company should have complained to the State Tax Commission sometime between April 1, 1927 (when the State Board of Equalization finally passed upon the assessment of bank stocks) (Record, p. 33) and the time when the tax rolls are delivered to the collectors, which was about October 1, 1927. A clear and adequate remedy, disclosed for the first time in the court's opinion on June 29, 1929, must have been invoked by the Trust Company between April 1 and October 1, 1927. For failure to avail itself of this remedy the Trust Company is denied any standing in a court of equity.

ASSIGNMENT OF ERRORS.

I.

The decision of the Supreme Court of Missouri in this cause contravenes the appellant's right under Section 1 of the Fourteenth Amendment of the Constitution of the United States to the equal protection of the laws by refusing to grant petitioner any relief against an assessment which was intentionally, deliberately, systematically, and fraudulently discriminatory against the petitioner.

II.

The Supreme Court of Missouri erred in refusing to grant such relief to the petitioner against such discriminatory assessment for taxes by holding that the petitioner had no right to come into a court of equity for injunctive relief against the discriminatory part of the assessment and tax because the petitioner had not first appealed to the State Tax Commission for redress of its grievances when, under the law at the time when said appeal must have been taken, Article IV of Chapter 119 of the Revised Statutes of Missouri of 1919, which purported to grant a legal remedy to petitioner against such discriminatory assessment and tax, was held to be unconstitutional in so far as it was intended to give the State Tax Commission any power or jurisdiction to grant redress against such discriminatory tax. The effect of such

decision was to deprive the petitioner of an opportunity to be heard in defense of its constitutional rights before any tribunal or administrative body and amounts to a denial to the petitioner of due process of law guaranteed to it under the Fourteenth Amendment of the Constitution of the United States.

III.

The Supreme Court of Missouri erred in refusing to grant relief to the petitioner against such discriminatory assessment of taxes on the ground that the petitioner must first exhaust his legal remedy, that is, by appealing to the State Tax Commission, although the State Tax Commission has no legal right or authority to lower the assessment of petitioner's property which is admittedly assessed at its full value in money. Therefore, the State Tax Commission could only grant relief by placing upon the assessment rolls all of the property deliberately omitted therefrom and by assessing such omitted property and the great bulk of other property which was under assessed, at their full value in money. This is equivalent to a holding that the petitioner's remedy is not in a court of equity, but by a proceeding before a tribunal for the purpose of getting the assessment of other property raised up to the level of the assessment of petitioner's property.

PETITIONER'S BRIEF.

I.

The decision of the Supreme Court of Missouri in 1929 that the Trust Company had a right in 1927 to complain to the State Tax Commission for redress of its grievances and that the Trust Company's failure to complain to the State Tax Commission in 1927 constitutes laches which prevents it from coming into a court of equity for relief is, under the circumstances shown in this record, an arbitrary denial to the Trust Company of its constitutional right to the equal protection of the laws.

The Trust Company cannot here complain of the court's decision that the State Tax Commission had ample power and jurisdiction under the Missouri statute to grant such relief. That is a state question about which the Supreme Court has a right to change its mind. If it sees fit in 1929 to adopt certain conclusions which in 1922 it characterized as "preposterous" (*Laclede Land & I. Co.* v. *State Tax Commission*, 295 Mo. l. c. 303) and "unthinkable" (S. C. p. 304) it can do so. However, when it goes a step further and denies the Trust Company its rights under the Federal Constitution upon the ground that the Trust Company has been guilty of laches in not complaining to the State Tax Commission in 1927, such action is an arbitrary denial of a citizen's constitutional right. State courts have a right to change their

minds regarding the law, but the declaration of the state court in 1929 that the Trust Company in 1927 had a plain, clear, and certain legal remedy by complaint to the State Tax Commission in 1927, in the face of the consistent policy of the State Tax Commission to refuse such jurisdiction and in the face of the state court's decision that it had no right to take such jurisdiction, *does not change the fact that the Trust Company did not have in* 1927 *a plain, clear, legal remedy before the State Tax Commission.* Therefore, the question before Your Honors is not a question of state practice but a question as to whether you will permit a state court to arbitrarily deprive a citizen of its admitted right to relief against an infringement of its constitutional rights.

II.

The only possible relief which the State Tax Commission could have granted to the petitioner, if the petitioner had applied to it for redress, would have been for the State Tax Commission to have placed upon the assessment rolls the property which had been intentionally omitted therefrom by the other assessing officers and by assessing the same and also all underassessed property, which embraced practically all other property in the taxing district, at its full value in money.

The powers of the State Tax Commission are conferred by Article IV of Chapter 119, R. S. Mo. 1919, which, among others, contains the following provisions:

> Section 12847. It shall be the duty of the Commission and the Commission shall have power

and authority subject to the right of the State Board of Equalization, finally to adjust and equalize the value of real and personal property among the several counties of the state, as follows:

(1) To have and exercise general supervision over all the assessing officers of the state, over County Boards of Equalization and appeal in the performance of their duties and to take such measures as will secure the enforcement of the provisions of this article and all the properties in this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law.

(3) To receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist.

(7) To cause to be placed upon the assessment rolls omitted property which may be discovered to have, for any reason, escaped assessment and taxation * * *.

(8) To raise or lower the assessed valuation of any real or personal property of any individual * * * or corporation; provided, etc.

All of the statutes of Missouri relating to the assessment of real and personal property of every character provide that all property shall be valued and assessed according to its true value in money.

Sections 12802 and 12775, R. S. Mo. 1919.

The State Board of Equalization, whose approval is necessary to give validity to any act of the State Tax

Commission is only given authority to assess property at its true value in money.

Section 12855 confers upon the State Board power only to increase the valuation of property which it believes to be valued below its real value in money by such percentum as will increase the same to its true value or to deduct from the valuation of property deemed to be valued below its real value in money such percentum as will increase the same in each case to its true value.

There is nothing in the entire statutory scheme for the assessment of property in Missouri which authorizes any assessing officer or body to assess any property at less than its true value in money.

The State Tax Commission had no legal right or power to assess our stock at less than its admitted true value in money. Therefore, it could only grant redress by raising everything else up to the level of our assessment.

As regards discriminatory valuations, the possibility of relief in administrative tribunals is at best doubtful. Therefore, where it is doubtful whether the Tax Commission has authority to equalize valuations downward and so avoid the pernicious effect of alleged discrimination, the decision of the Supreme Court of Missouri holding that recourse must first be had to the State Tax Commission is equivalent to holding that the petitioner has no remedy except to have the property assessed below its true value raised, rather than to have its property which is assessed at its true value reduced. Such remedy is no remedy at

all and the decision of the Supreme Court requiring petitioner to have recourse to such a remedy is a denial to the petitioner of the equal protection of the laws.

Sioux City Bridge Co. v. *Dakota Co.*, 260 U. S. 441, l. c. 445 and 446.
Green v. *R. R. Co.*, 244 U. S. 499, l. c. 507, 513, 521.
Conn v. *Ringer*, 32 Fed. (2d) 639, l. c. 644.

III.

From the time of the assessment of petitioner's property in June, 1926, until the final judgment of the Supreme Court of Missouri in this cause, August 2, 1929, there was no court, tribunal, or administrative body in existence which had authority to hear the petitioner's complaint or grant any redress whatever excepting a court of equity.

(1) The County Board of Equalization had no power to grant relief to petitioner. The Supreme Court of Missouri so held in the opinion in this cause (19 S. W. (2d) l. c. 749).

(2) There was no statute providing for an appeal to the State Board of Equalization. See the opinion in this cause (S. C. 19 S. W. (2d) l. c. 749).

(3) The aggrieved taxpayer cannot pay the tax under protest and later recover the same.

Robbins v. *Latham*, 134 Mo. 466.

(4) The aggrieved taxpayer cannot set up the defense of fraudulent discrimination as a defense in

an action by the collector to collect the tax, but must resort to a court of equity.

State ex rel. v. *Western Union Telegraph Co.*, 165 Mo. 502.
State ex rel. v. *Johnson*, 279 Mo. 228.

(5) The aggrieved taxpayer had no right of appeal to the State Tax Commisson and the State Tax Commission had no jurisdiction to entertain any such appeal or to grant any redress because the law under which the State Tax Commission came into existence and derived its powers was unconstitutional in so far as it appeared to confer any such jurisdiction.

Laclede Land & Imp. Co. v. *State Tax Commission*, 295 Mo. 298.

This case was overruled by the Supreme Court in the present case.

There was, therefore, no place in the whole scheme of assessing or levying or collecting the tax for the petitioner to be heard excepting in a court of equity.

Boonville Nat'l. Bank v. *Schlotzhauer*, 317 Mo. 1298.

Therefore, the decision of the Supreme Court of Missouri that the petitioner had no standing in a court of equity because it had failed to pursue its legal remedy, left the petitioner without any court or tribunal competent to pass on the validity of a fraudulently discriminatory tax and is a denial to the petitioner of due process of law.

Central of Georgia Ry. Co. v. *Wright*, 207 U. S. 127, 141.
Londoner v. *City*, 210 U. S. 373, 385.
Turner v. *Wade*, 254 U. S. 64, 67.

The assessment was made by the assessor as of June 1, 1926.

R. S. Mo. 1919, Sec. 12766.

The State Board of Equalization met for the purpose of equalizing the taxes of 1927, in February, 1927. Sec. 12854.

The County Board of Equalization met for the same purpose on the first Monday of April, 1927. Section 12820, R. S. Mo. 1919.

The taxes of 1927 fell due October 1, 1927, and became delinquent January 1, 1928. Sections 12906 and 12907, R. S. Mo. 1919.

If the petitioner had a right to appeal to the State Tax Commission, said appeal must be taken between April 1, 1927 (Record, p. 34) and the time when the collector receives the tax books from the county collector.

Section 12848, R. S. Mo. 1919.

Therefore, there was not any court, tribunal, or administrative body in existence which between April 1 and October 1, 1927, had authority to hear petitioner's complaint or grant any redress whatever excepting a court of equity. Consequently, the court's refusal to permit the court of equity to take jurisdiction of the Trust Company's complaint is a denial of due process of law to the Trust Company.

Respectfully submitted,

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